



LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 201

[Docket No. 2012-1]

Copyright Office Fees: Cable and Satellite Statement of Account Fees

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The U.S. Copyright Office (“Office”) is publishing a final rule establishing a fee schedule for filing cable and satellite statements of account pursuant to Sections 112, 119, and 122 of Title 17 of the United States Code (“SOAs”) in accordance with the Satellite Television Extension and Localism Act of 2010 (“STELA”). The Office is establishing these SOA fees after taking into account public comments received in response to the Office’s March 28, 2012 Notice of Proposed Rulemaking and December 6, 2012 Notice of Proposed Rulemaking.

DATES: This rule is effective January 1, 2014.

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SUPPLEMENTARY INFORMATION:

I. Background

The Office is charged with administering certain statutory licenses established under the Copyright Act, 17 U.S.C. 101 et seq. (“Act”), including fees for filing and processing cable and satellite SOAs pursuant to Sections 111 and 119. Previously, as permitted under the Act, the Office covered its administrative costs for processing these SOAs by charging the costs against the collected royalties. In 2010, however, Congress enacted STELA, amending the law to allow the Office to apportion the fees between copyright owners and statutory licensees. The Act requires that the fees assessed for filing SOAs “shall be reasonable and may not exceed one-half of the cost necessary to cover reasonable expenses incurred by the Copyright Office for the collection and administration of the statements of account and any royalty fees deposited with such statements.”¹

In light of the statutory change, the Office undertook a cost study of its Licensing Division, which processes SOAs, and issued a Notice of Proposed Rulemaking on March 28, 2012 (“First NPR”).² The First NPR suggested a three-tiered fee schedule for cable filings, with fees corresponding to the different types of cable SOAs (the three SOA forms are known as SA1, SA2, and SA3). Thus, the First NPR proposed the following SOA fees: \$15 for licensees who file an SA1 form; \$20 for licensees who file an SA2 form (slightly higher due to the somewhat greater review involved); and \$500 for licensees who file the SA3 form (substantially higher due to the complex nature of the

¹ 17 U.S.C. 708(a).

² Copyright Office Fees Notice of Proposed Rulemaking, 77 FR 18742 (Mar. 28, 2012). This Notice also included fee proposals for other fees, including for registration, recordation, and non-SOA licensing services, which will be the subject of a subsequent Final Rule.

Office's review and administration of SA3 filings). Additionally, the First NPR proposed a \$75 fee for satellite SOAs, reflecting the fact that these forms require attention beyond that needed for SA1 and SA2 forms.

The Office received three comments addressing the First NPR's proposed cable and satellite SOA fees. These comments were submitted by the American Cable Association ("ACA"); the National Cable & Telecommunications Association ("NCTA"); and jointly by Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, Music Claimants, Canadian Claimants Group, National Public Radio, Broadcaster Claimants Group, and Devotional Claimants (collectively, the "Copyright Owners"). NCTA expressed the concern that the proposed fees sought to recover costs for services "that go beyond what is reasonably necessary to administer the license." ACA requested that the Office provide a waiver of fees for cable operators experiencing financial hardship. Copyright Owners argued that the proposed fees failed to recover enough of the operating costs of the cable and satellite program.

In light of the comments received, and because the fees for the filing of cable and satellite SOAs were being set for the first time, the Office conducted a further analysis of the costs of administering the SOAs and published an updated fee schedule in a second Notice of Public Rulemaking on December 6, 2012 ("Second NPR").³ The Second NPR explained that the Office had conducted an additional cost study to address commenter concerns regarding cable and satellite SOA fees. As discussed below, the Office determined that its original review of costs in relation to the Licensing Division – using a methodology that differed to some degree from its approach to other fee services in the

³ Copyright Office Fees Notice of Proposed Rulemaking, 77 FR 72788 (Dec. 6, 2012).

Office unrelated to SOA fees – did not sufficiently reflect all of the costs incurred in the complex task of processing cable and satellite SOAs.⁴ To more completely assess the costs, the Office thus decided to conduct a second study using the more typical methodology, which captures administrative overhead, among other things.⁵

In the second Licensing Division cost study, the Office found that many costs are common to both cable and satellite filings – in particular the fiscal management and information technology costs – and thus should be shared by both types of filers.⁶ The Office proposed a modified fee schedule for cable and satellite SOA fees that better reflected the overall costs of the licensing program. Specifically, while the Office proposed to keep the recommended fees for SA1 and SA2 forms set forth in the First NPR (\$15 and \$20, respectively), it determined that fees for SA3 forms should be increased from \$500 to \$725.⁷ The Office further proposed to increase the fee for processing SOAs for satellite retransmissions from \$75 to \$725. While these fees included significant increases to certain fees initially proposed in the First NPR, the Office believed that they better captured the full costs associated with the management of these SOAs.

Lastly, in the Second NPR the Office declined to adopt a hardship waiver for SOA fees as advocated by the ACA. The Office noted that the statutory language in Section 708(a) does not include a reference to waivers, although another part of the Copyright Act, Section 708(c), does provide for discretionary waivers for government

⁴ *Id.* at 72789.

⁵ *Id.*

⁶ *Id.* at 72790.

⁷ *Id.*

actors in limited circumstances. From this, the Office concluded that Congress did not intend for the Office to establish waivers for STELA-based fees. Notably, the Office does not provide hardship waivers for other fees.⁸

The Office received three initial comments and three reply comments in response to the Second NPR. The initial comments came from the ACA, Copyright Owners, and NCTA. In these comments, the licensing stakeholders made a variety of arguments regarding the Office's methodology and the SOA fees proposed in the Second NPR.

The Copyright Owners expressed concern over the Office's proposed cable and satellite SOA fees. They stated that the new study excluded too many costs and thus did not reflect the full costs necessary to cover the Office's reasonable expenses. They also stated that the Office's new fees did not adequately balance the costs between copyright owners and licensees. The Copyright Owners further contended that the fees did not account for the continuing decline in the number of SA3 forms due to consolidation in the cable marketplace.

The ACA also filed comments, which focused on the hardship question initially set forth in the ACA's 2012 comments. ACA abandoned its original request for a hardship waiver in favor of a new request for a reduced rate for smaller entities filing SA3 forms. ACA requested that the Office provide an additional, lower-cost SA3 form for cable systems with 400,000 or fewer subscribers that would face a financial hardship if forced to pay a higher fee. The fee for this form, ACA urged, should be \$50, which it argued would be more manageable for smaller entities. ACA claimed that its proposed

⁸ *Id.* at 72790-91.

new fee would be reasonable under STELA and would not undercut the Office's administrative costs because these forms would constitute a minority of filings.

For its part, NCTA believed that it did not have adequate information to assess whether the new fee was reasonable. It thus filed a Freedom of Information Act ("FOIA") request seeking information about the Office's cost studies and submitted initial comments expressing concern over the reasonableness of the proposed fees.

In response to NCTA's FOIA request, the Office provided data that it believed properly could be supplied under FOIA⁹ and on February 7, 2013 held a meeting, open to all interested parties, to discuss the cost study.¹⁰ At the meeting, the Office explained its general approach and methodology in the second cost study regarding the establishment of cable and satellite SOA fees, and noted the following:

1. The Office used a three-year average of non-personnel costs in determining the baseline for new cable and satellite SOA fees. The Office used this three-year average (which spanned fiscal years 2009-2011) to avoid an aberrant result in light of the Office's recent reengineering process. If the Office had not used a three-year average for these costs, the results could have been skewed upward because of the relatively high costs incurred for reengineering efforts in 2011.
2. The Office did not use a three-year average when calculating personnel costs, but instead used payroll numbers from the pay period in effect at the time the Office commenced the second cost study. This is because a number of Licensing Division staff participated in an Office-wide voluntary separation package prior to the beginning of the study, which resulted in a decrease in staffing. The Office thus looked to the pay period immediately preceding the commencement of the second cost study because earlier time frames would have artificially inflated the personnel costs.

⁹ The Office withheld documents that fell within FOIA Exemption 5, which permits an agency to withhold records reflecting an agency's deliberative process. *See* Letter from George Thuronyi, Chief FOIA Officer, to Seth A. Davidson (Jan. 25, 2013).

¹⁰ The Office invited all parties who filed comments on cable and satellite SOA fees to attend the meeting. The Office also posted a notice of the meeting on its website in case others were interested in attending.

3. Once the Office determined the appropriate time frame(s) for assessing costs, pursuant to its mandate to set reasonable fees, it excluded certain items from the cost study. For example, the cost study excluded 75% of the cost of the Licensing Division's Fiscal Division staff because they largely support maintenance and distribution of royalty fees collected on behalf of copyright owners. Because these funds can remain undistributed for decades (through no fault of the licensees), these efforts inure largely to the benefit of copyright owners rather than SOA filers. The Office also excluded costs associated with Audio Home Recording Act filings as well as public outreach, among other exclusions for activities unrelated to cable and satellite SOAs. The Office explained that these exclusions resulted in lowering the overall amount of costs to be apportioned between copyright owners and licensees.
4. In response to stakeholders questioning the likelihood that the number of SA3 form filings would remain stable in the future, the Office explained that it had reviewed data for three years and used this to project the number of filings in the future. The statute requires the Office to recover 50% or less of costs, and thus the Office took a somewhat conservative approach so as not to underestimate potential filings, a circumstance that could result in total fee collections above the statutory limit.
5. Finally, it was noted that once the exclusions were applied, under the proposed fees, the Office projected that licensees would pay approximately 47% of the applicable costs, consistent with the statutory mandate.

After the February 7 meeting, Copyright Owners, NCTA, and DirectTV filed reply comments. Copyright Owners continued to argue that the Office should not have excluded certain costs. In addition, Copyright Owners reiterated their view that there is a downward trend in the number of operators, and objected to ACA's new proposed hardship filing fee. NCTA continued to urge that it had inadequate information on the Office's cost study and also contended that the Copyright Owners' desired increases in fees were inappropriate. NCTA also continued to dispute the Office's decision regarding the costs to be included in its calculations. DirectTV stated that the Office should not further increase satellite filing fees.

II. Fee Setting Methodology

In conducting its cost study analysis, the Office reviewed established accounting procedures used by other governmental entities, including the Federal Accounting Standards Advisory Board's ("FASAB's") guidelines for determining the full cost of federal agency program activities¹¹ and the Office of Management and Budget's *Circular No. A-25 Revised: User Charges*¹² document regarding costing guidelines and establishing user fees.

When the Office began studying potential cable and satellite SOA fees, it used the additive model to assess costs, which it also uses for peripheral fee services such as responding to FOIA requests, and some seldom-invoked services such as full-term retention of registration deposits. The additive method focuses on the desk time of dedicated employees, meaning the amount of time they spend performing activities involved in processing a typical service request. The Office initially decided to use this model because, at the time, it was thought it might be well suited to evaluate cable and satellite SOA processing costs.

As discussed above, several commenters contested the initially proposed SOA fees and, after careful review, the Office determined that the additive model did not capture all costs of performing these services, including indirect costs and time spent on upgrades to improve the processing of SOAs to the benefit of both copyright owners and filers. The Office ultimately recognized that, while effective in analyzing services that can be measured by short intervals of time, the additive method is sometimes not as

¹¹ This includes FASAB's Managerial Cost Accounting Concepts and Standards for the Federal Government.

¹² See http://www.whitehouse.gov/omb/circulars_a025.

successful in determining the cost of a more complex task, such as processing an entire cable or satellite SOA. The management of cable and satellite SOAs is one of the Office's major programs and constitutes the greatest percentage of staff time and related resources within the Licensing Division. Thus, the Office concluded that the study described in the First NPR did not fully reflect the cost of the program to the Licensing Division and was not an appropriate measure by which to establish SOA fees.

In light of these determinations, the Office conducted another cost study using an alternative activity-based methodology that is consistent with that employed to evaluate other types of services – including its registration and recordation functions – but with certain exclusions specific to the operation of the Licensing Division. These adjustments were reviewed at the FOIA meeting, as set forth above.

The second study yielded a more complete picture of the costs of administering the SOA program. It reflects all relevant staff time, whether directly or indirectly associated with program functions, and all relevant non-personnel costs. Because it is all-inclusive, the revised methodology accounts for costs incurred in connection with difficult or exceptional circumstances that involve time-intensive research or problem resolution. For example, it includes cases where electronic funds transfer payments need to be matched with an SOA received much earlier or later than the payment or without a remittance advice. It also covers non-routine staff effort. During the period under review, for example, the Office revised work procedures and forms and updated its internal information systems to facilitate its implementation of other aspects of STELA. The Office expects similar types of administrative and technical upgrades to continue to occur during the life of the SOA program as legal and practical requirements evolve.

STELA directs that the fees collected from licensees filing SOAs shall be reasonable and may not exceed one-half of the Office's reasonable expenses to administer the cable and satellite SOA program, including the collection and administration of SOAs and any royalty fees deposited with such statements. 17 U.S.C. 708(a). The fees established by this Final Rule are designed to recover just under one half of the Office's total cost of administering the SOA program. Of the Licensing Division's \$5.27 million budget, the Office estimated in the Second NPR that the costs of administering filings under the cable and satellite SOA program would be \$3.74 million, a number that the Office has since revised slightly upward, to \$3.76 million, after a final review of its cost data.¹³ At the fee levels hereby adopted, based upon projected filings, the expected annual fee recovery under the SOA program should be approximately \$1.77 million, or 47% of the estimated \$3.76 million total annual cost of the program.¹⁴

III. Final Cable and Satellite SOA Fees

The Office is instituting the following SOA fees:

1. Fee for processing of a statement of account based on secondary transmissions of primary transmissions pursuant to Section 111: \$15 for SA1 forms, \$20 for SA2 forms, and \$725 for SA3 forms
2. Fee for processing of a statement of account based on secondary transmissions of primary transmissions pursuant to Sections 119 or 122: \$725

As explained above, with the enactment of STELA, the Office is authorized for the first time to impose a fee that apportions costs between SOA filers and copyright owners, who until now have shouldered all of these costs through deductions from their

¹³ The slight increase does not materially impact the projected recovery rate for the cable and satellite program, which is still estimated at 47%.

¹⁴ The data and calculations comprising the Office's cost study with respect to cable and satellite fees are available on the Office's website at www.copyright.gov/docs/newfees/.

royalty funds. Thus, this fee study presents the Office with its first opportunity to establish SOA fees based on a review of the Office's costs for processing these SOAs.

Based on its cost study findings, the Office is creating a three-tiered fee schedule for cable operators that corresponds to the filing of the different types of cable SOAs and accounts for the increased time spent processing the more complex forms. The fee for licensees who file the SA1 form (and may pay as little as \$52 each accounting period) is set at \$15, at the low end of the scale, while the fee for cable systems filing the SA2 form is set slightly higher, at \$20, due to somewhat higher processing costs. These fees reflect the fact that the resources required to review SA1 and SA2 forms are relatively small in comparison to those needed to process SA3 forms, as discussed below. The SA1 and SA2 form fees are reasonable in light of the lesser amount of processing required and the typical royalty payments associated with such statements.

The Office is also establishing both the cable SA3 filing fee and satellite filing fee at \$725. The \$725 fee is reasonable in light of the findings of the second, more complete cost study and the more substantial royalty payments associated with these SOAs. Licensees who file the considerably more complicated SA3 form should pay a correspondingly higher fee because of the time associated with reviewing the information in such filings, including the detailed classifications of community groups, television stations, and channel lineups. The \$725 fee also takes into account that the SA3 forms reflect substantial royalty payments that far exceed those collected with SA1 and SA2 forms. The SA3 form fee is thus consistent with the higher amount of royalties involved and the larger amount of time that Licensing Division staff must take to accurately

process the forms and royalty payments. The processing of satellite SOAs similarly involves significant royalty payments and a substantial commitment of Office resources.

Finally, the Office declines to create a lesser “hardship” fee for smaller cable operators that file SA3 forms. The Office has set the SOA fees to reflect its costs and has established significantly lower fees for cable systems that file the far less complex SA1 or SA2 forms. Notwithstanding the lower number of subscribers, the Office does not spend less time processing SA3 forms filed by smaller operators and thus there is no cost-based reason for a reduced fee.

In establishing fees for cable and satellite SOAs, the Office carefully reviewed public comments and held a meeting with interested parties, as described above. As might be expected, copyright owners have advocated for higher fees and filers have sought lower ones. Based on its cost study, the Office believes that it has found the appropriate middle ground. The Office concludes that the SOA fees it is now adopting are fairly apportioned, reasonable, and otherwise consistent with the guidance set forth in Section 708(a). Nonetheless, because the fees are new, the Office will continue closely to monitor its costs relating to the filing of cable and satellite SOAs, as well as the fees it collects, so it can adjust the fees as appropriate in the future.

List of Subjects in 37 CFR Part 201

Copyright, General provisions.

Final Rule

- In consideration of the foregoing, under the authority of 17 U.S.C. 702, the U.S. Copyright Office amends 37 CFR chapter II as follows:

PART 201 – GENERAL PROVISIONS

- 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

- 2. Amend § 201.3 to add paragraphs (e)(9) and (10) to read as follows:

§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.

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(e) * * *

Licensing Division Services	Fees
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(9) Processing of a statement account based on secondary transmissions of primary transmissions pursuant to 17 U.S.C. 111:	
(i) Form SA1	15
(ii) Form SA2	20
(iii) Form SA3	725
(10) Processing of a statement of account based on secondary transmissions of primary transmissions pursuant to 17 U.S.C. 119 or 122	725

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Dated: November 25, 2013

Maria A. Pallante
Register of Copyrights

[BILLING CODE: 1410-30-P]

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